

## ARIZONA JUDICIAL COUNCIL

### Request for Council Action

---

**Date Action  
Requested:**

December 9, 2021

**Type of Action  
Requested:**

☒ Formal Action/Request  
☐ Information Only  
☐ Other

**Subject:**

FASTAR Update

---

**FROM:**

Hon. Kellie Johnson  
Civil Presiding Judge  
Superior Court of Arizona in Pima County

**DISCUSSION:**

In 2017, the Supreme Court established the Fast Trial and Alternative Resolution Program ("FASTAR") pilot program in the Superior Court in Pima County. The program's goal is to reduce the time and cost of resolving Tier One civil cases that request only money damages.

Judge Johnson will present this third progress report to the Arizona Judicial Council.

**RECOMMENDED COUNCIL ACTION:**

Approval of the report and its recommendations, including a recommendation that the Court extend the duration of the pilot program for two additional years.



December 9, 2021

Hon. Robert Brutinel, Chair  
Arizona Judicial Council  
1501 West Washington Street  
Phoenix Arizona 85007

Re: Report on the FASTAR Pilot Program

Dear Chief Justice Brutinel:

1. **Introduction.** On October 26, 2017, Administrative Order No. 2017-116 established a 3-year FASTAR pilot program in the Superior Court of Arizona in Pima County. ("FASTAR" is an acronym for "Fast Trial and Alternative Resolution.") The Order also adopted interim rules of procedure, the FASTAR rules, for the pilot.

As directed by A.O. 2017-116, the Superior Court in Pima County and the AOC's Court Services Division previously provided progress reports to the Arizona Judicial Council. These reports were submitted in March 2019 and December 2019 and respectively covered the first and second years of the pilot program. A rule petition, No. R-20-0012, was filed by Presiding Judge Kyle Bryson in January 2020 that requested permanent adoption of the FASTAR rules and provided additional information concerning the program. The pandemic intervened and in June 2020, Judge Bryson requested that the Court defer consideration of his petition. The Court deferred consideration of R-20-0012 until the December 2021 Rules Agenda. In the interim, Administrative Order No. 2020-158 extended the pilot program until December 31, 2021. That Order also required the submission of this update.

2. **Background.** In December 2015, the Supreme Court directed the Committee on Civil Justice Reform ("the Committee") to develop recommendations, including rule amendments and pilot projects, to reduce the cost and time of resolving civil cases in Arizona's Superior Court. The Committee thereafter issued a report discussing, among other topics, Arizona's system of compulsory arbitration. The Committee identified areas of concern within the state-wide compulsory arbitration system, such as:

- Many court-appointed arbitrators lack the experience, expertise, availability, or willingness to conduct arbitration proceedings.
- The process of appealing from an arbitration award is burdensome and expensive, particularly in personal injury cases; and
- Arbitration is a factor in a nationwide phenomenon in civil cases known as the "vanishing" jury trial.

As one of its proposals, the Committee recommended establishing a pilot program to reduce the time and cost of resolving smaller value cases, and secondarily, to enhance opportunities for courtroom trials. The Arizona Judicial Council approved the Committee's recommendation, and the Supreme Court thereafter entered Administrative Order No. 2017-116. At the request of the Pima County presiding judge, the Order lowered the jurisdictional limit for compulsory arbitration to \$1,000, effectively replacing compulsory arbitration in Pima County with FASTAR.

On January 9, 2020, Judge Bryson filed rule petition No. R-20-0012. The petition requested the Court to permanently adopt the FASTAR Rules of Procedure, with several modifications. One modification proposed an amendment to FASTAR Rule 101, and a corresponding modification to the title of this set of rules, which would facilitate the use of these rules in any county in the state that wanted to have a FASTAR program. The Supreme Court opened the petition for public comment and then the COVID pandemic struck, resulting in modified court operations and the temporary cessation of jury trials. In June 2020, after the comment period for R-20-0012 closed, Judge Bryson requested the Court to defer action on the petition and to instead extend the pilot program. On October 7, 2020, the Supreme Court issued Administrative Order No. 2020-158, extending the program until December 31, 2021, and directing the filing of this report.

At its August 24, 2021, Rules Agenda, the Supreme Court continued its consideration of R-20-0012 and re-opened the petition for an additional public comment period. Two additional comments were filed and the Pima County presiding judge, who is now the Hon. Jeffrey Bergin, filed a supplemental reply. The Supreme Court is set to consider the petition at its December 7, 2021, Rules Agenda.

3. **The FASTAR Rules.** Under FASTAR Rule 101, a case that requests only monetary damages not exceeding \$50,000 generally qualifies for the program. (A case will not qualify, however, if the plaintiff needs to serve the defendant in a foreign county, because that circumstance would likely require extensions of FASTAR time limits.) In lieu of filing a certificate of compulsory arbitration with the complaint, as the Arizona Rules of Civil Procedure currently require, FASTAR requires the plaintiff when filing the complaint to certify whether the case is eligible for FASTAR. Most Tier 1 cases are eligible for FASTAR. Within 20 days after the defendant's first filing, the plaintiff also must file a "Choice Certificate." This certificate requires the plaintiff to choose either a "Fast Trial" or "Alternative Resolution" track for case resolution.

***Fast Trial Track.*** If the plaintiff chooses a Fast Trial, the court will set a trial date (either a bench or jury trial) no sooner than 190 days but no later than 270 days after the filing date of the complaint. The Fast Trial track includes rules for expedited disclosure and discovery.

There are special provisions for depositions of medical providers and other expert witnesses. Those provisions limit the length of these depositions to two hours (one hour per side) and limit the fee of the medical provide or expert to not more than \$500 per hour. These provisions allow video recording of the deposition by any unobtrusive and reliable device, eliminating the cost of a professional videographer. FASTAR provisions also allow the introduction of the video recording at trial. The length of trial is limited to two days. A final judgment after a Fast Trial is appealable to the Court of Appeals, as provided by law.

***Alternative Resolution Track.*** A plaintiff who chooses Alternative Resolution must (a) waive the right to a trial before a judge or a jury, and (b) waive the right to appeal an Alternative Resolution decision or award to the superior court or an appellate court. A defendant in an Alternative Resolution proceeding who is dissatisfied with the subsequent Alternative Resolution award, however, can appeal the award to the superior court, thus preserving the defendant's right to a trial. By comparison, any party who participates in compulsory arbitration under Civil Rules 72 through 77 has a right to an appeal – which is actually a trial *de novo* rather than an appeal – in the superior court. A tort plaintiff by special action challenged whether this FASTAR process conflicted with the arbitration provisions in A.R.S. § 12-133, but the Supreme Court determined that no conflict existed. See Duff v. Lee (Tucson Police Department), 250 Ariz. 135, filed November 25, 2020.

Unless the parties agree to the arbitrator, a court-appointed arbitrator will conduct the Alternative Resolution proceeding. The arbitrator must set a hearing date within 2 to 4 months after being appointed. The subsequent Alternative Resolution proceeding and the process for entry of an award generally correspond to the current provisions for compulsory arbitration under the Civil Rules.

#### **4. Comparative Data.**

**Before implementation of FASTAR:** Civil filings in the Pima County Superior Court in 2015 included:

- 793 compulsory arbitration cases.
- 220 arbitration awards.
- 73 appeals requesting a trial *de novo*. (This figure represents about 9% of the total number of compulsory arbitration cases, and about one-third of the awards.)

Pre-FASTAR, the average time to case disposition in the Pima County Superior Court for compulsory arbitration cases was about 8 months. In cases in which a party appealed a compulsory arbitration award, and the Court conducted a trial *de novo*, case resolution took up to 2 years. For the last full year of the compulsory arbitration system in Pima

County, when any party could appeal the arbitration award, the court conducted 5 trials *de novo*.

**FASTAR data:** From November 1, 2017, to October 31, 2018 (reporting period 1), there were 2,113 FASTAR cases. From November 1, 2018 to October 31, 2019 (reporting period 2) and November 1, 2019 to October 31, 2020 (reporting period 3), there were respectively 2,381 and 2,209 FASTAR cases. For the first 11 months of reporting period 4 (November 1, 2020 to September 30, 2021), 2,367 cases were filed.

Under FASTAR Rule 103, a choice certificate can be filed with the complaint, or within 20 days after the defendant files an answer. Plaintiffs customarily wait until after the defendant files an answer before filing a choice certificate to learn who will be appearing for the defendant, or to confirm that an answer will indeed be filed. Accordingly, if the case proceeds to default or is dismissed for lack of prosecution or a lack of timely service, or if a case is settled before the defendant files an answer, a choice certificate probably won't be filed. Historically, choice certificates have been filed in slightly less than half of the cases. If the plaintiff fails to file a choice certificate within 20 days after the defendant has answered, then Rule 103(c) provides that the case will proceed by Fast Trial.

In the first reporting period, 996 choice certificates were filed. The majority, 538 (54%), selected Alternative Resolution. By comparison, 229 certificates chose Fast Trial. In addition, 180 cases in which no certificate was filed went into the Fast Trial track by default, for a total of 409 Fast Trial cases. The numbers were relatively similar in reporting period 2 (630 cases went into the Alternative Resolution track, versus 435 cases for Fast Trial.) Reporting period 3, which was from November 2019 to October 2020, included the first six months of the pandemic. This period showed a relative spike in Alternative Resolution (635 cases, or 64%) compared to Fast Trial (326 cases.) For reporting period 4, which is not yet complete, the numbers are more within the norm (533 cases (58%) in Alternative Resolution, and 361 in Fast Trial.)

The times to disposition for FASTAR cases during the 4 reporting periods is generally about 5 months from the filing of the complaint. The disposition times for these 4 periods are respectively 151, 151, 161, and 109 days. These figures include every FASTAR case, including those in which no choice certificate was filed, and that proceeded to default or dismissal before an assignment to either the Fast Trial or Alternative Resolution track.

For cases in the Alternative Resolution track, the respective times to disposition during these 4 reporting periods are, respectively 185, 185, 172, and 108 days. By comparison, for cases in the Fast Trial track, the respective numbers are 153, 169, 208, and 137 days.

During the 4 reporting periods, trials were conducted in, respectively, 16, 7, 4, and 2 cases. The data does not capture whether these were bench or jury trials, or whether they were original Fast Trial cases or Alternative Resolution appeals.

5. **Comments Regarding R-20-0012.** R-20-0012 is Judge Bryson's petition requesting permanent adoption of the FASTAR rules.

**Legal challenges.** Four Pima County practitioners, one of whom represented the special action petitioner in *Duff, supra.*, filed comments in R-20-0012 that described the FASTAR program as coercive because the selection of Alternative Resolution requires a waiver of a jury trial. As noted above, however, the Court rejected these legal challenges in *Duff*.

**Jury trials.** The comments also criticized the program because it has not increased the number of jury trials. FASTAR's effect on the number of trials is difficult to assess. In the first two years of the program (November 1, 2017 to October 31, 2019), there were 23 trials. (As noted above, the data does not differentiate how many of these were jury trials.) But because of the pandemic, there were no jury trials in any Pima County civil or criminal cases from March 2020 through April 2021. This hiatus created a bottleneck and delay, and many cases in the Fast Trial queue were actually converted at the parties' request to Alternative Resolution. For the third and fourth years of the pilot, not only did the number of trials decline to 7, but cases that stayed in the Fast Trial track saw increased times to disposition because those cases were placed on hold for a considerable time. For these reasons, the data regarding the number of trials and disposition times are skewed and not reflective of the program functioning as intended. The numbers continued to be skewed as we approach the end of the fourth year of the pilot, as the court works toward resuming normal operations.

There is therefore insufficient data to draw reliable conclusions about the pilot's impact on the frequency of trials. However, it is important to emphasize that increasing the number of trials was not the primary purpose of the pilot program. While increasing trials was thought to be a potential benefit of the program, the primary focus and goal of FASTAR is to reduce the time and cost of resolving smaller value cases. The data collected to date indicates the program is succeeding in these areas, and that it compares favorably to pre-FASTAR compulsory arbitration proceedings.

**Medical bills.** Another complaint of practitioners was the difference in the admission of medical bills at a Fast Trial versus an Alternative Resolution proceeding. The process for admission of medical bills at an Alternative Resolution hearing under FASTAR Rule 123(d) is modeled on Ariz. R. Civ. P. 75(d). Under both rules, and in the absence of a prehearing objection, the arbitrator must admit the bills. A foundational showing of reasonableness and necessity is not required at an Alternative Resolution

hearing. By comparison, FASTAR Rule 117(d), currently requires a party requesting the admission of a medical bill at a Fast Trial to establish that the amount of the bill is reasonable, and that the professional service described in the bill was medically necessary. This conforms to the practice for admission of a medical bill in any other superior court civil trial.

A recently filed comment in R-20-0012 noted, “Many plaintiffs’ personal injury attorneys dislike the current Fast Trial Track rule and feel they are forced to choose the Alternative Resolution Track because it is too difficult and costly to bring medical providers into trials to establish the necessary foundation to admit medical bills into evidence.” (Comment from Mr. Bernheim, filed on October 15, 2021, at page 3.) Another recent comment observed, “The issue of medical bills is a difficult one and ultimately comes down to the question of who should bear the burden – either the plaintiff to prove reasonableness of such expenses or the defendant to disprove the reasonableness.” (Comment from Mr. Ruzow, filed October 13, 2021.)

At about the time Judge Bryson filed R-20-0012, attorney James Abraham filed rule petition number R-20-0014, which also concerned FASTAR. In addition to proposing the elimination of the Alternative Resolution track, which the presiding judge in Pima County strongly opposes, Mr. Abraham’s petition (at pages 7-8) addressed the issue of medical bills in a Fast Trial. After identifying the issue regarding the reasonableness of medical bills, Mr. Abraham’s petition

... requests that the FASTAR Rules be changed so that the rules provide for a rebuttable presumption that the Plaintiff’s submitted medical bills are reasonable in amount, but still allowing any party to offer evidence challenging the reasonableness of any submitted medical bill.

The shifting of this burden of proof to the defense is fair. Typically, a collision-injured Plaintiff will see at least four health care providers, such as an ER/Urgent Care provider, a PCP/chiropractor, a radiology provider, and often a specialist, such as an orthopedist or a neurologist. At trial, under the current trend, the Plaintiff would have to call at least four to five fact witnesses from medical providers to explain why their bills are reasonable, or the Plaintiff would need to hire an expert to review all the medical bills, and then explain their opinions to the jury. These are both time-consuming and expensive processes for all parties.

Auto insurance carriers carefully examine all medical bills. Anecdotally, based on 24 years of insurance defense work in auto collisions for five (5) large auto insurance carriers, the undersigned Petitioner knows that the carriers usually only challenge the amount of a medical bill when the charge seems to be grossly unreasonable. Usually, medical bills are disputed with expert testimony when



thousands of dollars are at stake, rather than hundreds of dollars. The only practical way to dispute the amount of a medical bill is with expert testimony. If a medical bill appears to be grossly overpriced, then it is likely to be disputed by the carrier, no matter who has the burden of proof for the reasonableness of that particular bill. The burden of proof should be on the industry, as that's its business, not the Plaintiff, who did not choose to be in an auto accident, and often was carted away by ambulance to the nearest hospital.

We acknowledge that at its December 2020 Rule Agenda, the Court denied Mr. Abraham's petition. After considering the observations of Mr. Ruzow, Mr. Bernheim, Mr. Abraham, and others, however, Judge Bergin's supplemental reply in R-20-0012 acknowledged that it would now be appropriate to amend Rule 117(d)(1) in accordance with Mr. Abraham's proposal. The amendment proposed by the supplemental reply would delete current text requiring the plaintiff to establish a foundation of reasonableness. It would add language that says, "the amounts of all medical bills are presumed reasonable, but any party may offer evidence to dispute the presumption of reasonableness of any medical bill." Judge Bergin's proposed amendment would still require the proponent to establish a foundation that the underlying medical treatment was necessary. Mr. Bernheim's proposal, contained in the appendix to his comment, will probably not solve the problem of attorneys avoiding the Fast Trial track because the burden of proving the reasonableness of medical bills would remain intact. The alternative proposed by Judge Bergin eliminates that burden and is a better option for encouraging litigants to choose the Fast Trial option.

***Tort motor vehicle cases.*** The State Bar filed a comment in R-20-0012 that was generally supportive of the FASTAR program. The Bar's comment, however, at pages 6-7, noted concerns that the Fast Trial option had not been selected as often in tort motor vehicle cases as it was in other types of cases, such as contract and debt collection cases. As correctly noted by the State Bar, the data indicates that as of June 2020, only 27% of motor-vehicle tort case plaintiffs selected the Fast Trial option, compared with approximately 49% of contract cases that elected a Fast Trial. Between November 2020 and June 2021, an even greater percentage of tort motor vehicle plaintiffs, 82%, chose the Alternative Resolution track. Some of the increase is likely attributable to the pandemic and the fact that Pima County did not resume trials until April 2021.

While it is clear from the data that practitioners gravitate toward Alternative Resolution in motor-vehicle tort cases, that is not dispositive of whether FASTAR is successful. The *primary* purpose of the program is to decrease disposition times, and the program has been successful in that metric.

6. **Conclusion.** Disposition times under both FASTAR tracks are apparently shorter than under the previous program of compulsory arbitration. We cannot quantify the parties' reduced costs of FASTAR, but for the reasons noted in section 3 of this report, they almost certainly exist. The rules for compulsory arbitration (Rules 72 through 77 of the Arizona Rules of Civil Procedure) contain no similar cost reducing mechanisms. The FASTAR program has value for both the court and litigants.

We recommend the FASTAR program be extended for an additional 2 years, that is, to October 31, 2023, to allow for further evaluation of the program without the overlay of pandemic limitations.

We further recommend that the Court adopt the proposed modifications to the FASTAR rules detailed in rule petition No. R-20-0012 for the duration of the pilot program. Those rule modifications are shown in the appendix to Judge Bryson's Reply and in Judge Bergin's Supplemental Reply in R-20-0012. We leave to the Court's discretion the adoption of the proposed modification to the title of this rule set and a proposed amendment to Rule 101(a), which would facilitate the adoption of a FASTAR program in other counties.

We appreciate the opportunity to provide this report.

Respectfully submitted,

/s/ \_\_\_\_\_  
Kellie L. Johnson  
Civil Presiding Judge  
Superior Court of Arizona in Pima  
County

/s/ \_\_\_\_\_  
Mark Meltzer  
Court Services Division  
Administrative Office of the Courts